



§§841(a)(1), 841(b)(1)(vii), and 846 (Count 1); on or about June 2, 2011, at or near Tucson, in the District of Arizona, possessed and carried firearms, or aided, abetted, counseled, commanded, induced, and procured the possession and carrying of firearms, specifically, one Sig Sauer, Model SP2022, 9mm caliber pistol, serial number SP0094054; one Springfield Armory, Model XDM-9, 9mm caliber pistol, serial number MG938162; and one Colt, Government Model Series 80, .45 caliber pistol, serial number CV26284, in furtherance of a drug trafficking offense as defined in 18 U.S.C. §924(c)(2), and 21 U.S.C. 802, et. seq., i.e., conspiracy to possess with the intent to distribute a controlled substance, as alleged in Count 1 of the indictment, in violation of 18 U.S.C. §924(c)(1)(A)(i) (Count 2); and on or about June 2, 2011, at or near Tucson, in the District of Arizona, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, i.e., Fleeing From A Law Enforcement Vehicle, case number CR20063300, and Theft Of Means Of Transportation, case number CR20063227, both felony offenses, in the Superior Court of Arizona, Pima County, Tucson, Arizona, on December 13, 2006, knowingly possessed firearms as alleged in Count 2 of the indictment, said firearms being in and affecting commerce in that such firearms were previously transported into the State of Arizona from another state or foreign country, in violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). (Count 3). (Doc. 25).

### **B. Facts**

The conspiratorial period<sup>1</sup> is alleged to have begun at some unknown point in time up to June 2, 2011. An undercover agent (hereinafter “agent”) first met with Defendant Carlos Chavez on April 18, 2011, regarding a home invasion-drug ripoff. Defendant Chavez only alluded to having a “crew” to carry it out.

The agent next met Defendant Chavez and Defendant Jesus Carillo on April 19, 2011. A general allusion to a “crew” to carry out the home invasion-drug ripoff was made with no

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<sup>1</sup>The Court takes judicial notice of the facts of the case from its Order (Doc. 50) entered on July 20, 2011, pursuant to Fed.R.Evid. 201.

1 reference to anyone else by name.

2 The agent next met with Defendant Chavez and Defendant Omar Lopez-Vanegas on  
3 May 26, 2011. A general allusion to a “crew” to carry out the home invasion-drug ripoff was  
4 made with no reference to anyone else by name.

5 The agent next met with Defendants Chavez and Lopez-Vanegas along with  
6 Defendants Cesar Moreno, Omar Castro-Niabra, Stephen Wimberly and Jesus Noriega at a  
7 park on May 30, 2011. At that meeting, Defendant Jesus Noriega, the instant movant, asked  
8 the agent what role the agent would play in the home invasion-drug ripoff, to which the agent  
9 replied “whatever you want me to do.” Defendant Jesus Noriega was assigned to tie down  
10 the agent during the home invasion-drug ripoff to make it appear as though the agent had no  
11 role in the home invasion-drug ripoff. Defendant Jesus Noriega also stated that four of the  
12 other Defendants would go into the home and announce themselves as “Police”.

13 The agent next met with Defendants Chavez and Lopez-Vanegas at the same park as  
14 before on June 1, 2011, and was told that the other Defendants wanted to meet at another  
15 park. The agent drove to the second park followed by Defendants Carillo and Lopez-  
16 Vanegas, each in separate vehicles. Waiting at the second park were Defendant Jesus  
17 Noriega and Defendant Castro-Niabra. While there, Defendant Jesus Noriega admonished  
18 the agent not to talk out loud about the drugs for fear that others in the park might overhear.  
19 Defendant Jesus Noriega assured the agent that the home invasion-drug ripoff would go  
20 through.

21 On June 2, 2011, the agent arranged with Defendant Chavez to meet the Defendants  
22 at a Holiday Inn parking lot on Grant Road west of I-10. Soon thereafter, Defendants Moreno  
23 and Wimberly arrived in a black Lexus; Defendants Carillo, Chavez and Lopez-Vanegas  
24 arrived in an Audi; and Defendants Ricardo Noriega, Miguel Mendoza, Castro-Niabra and  
25 Defendant Jesus Noriega arrived in a Suburban. All of the Defendants got out of their  
26 respective vehicles to meet with the agent. It appeared that Defendant Jesus Noriega was in  
27 charge of the meeting and he implied that Defendants Ricardo Noriega and Carillo would be  
28 together during the home invasion. Defendant Carillo wanted to exchange phone numbers

with Defendant Jesus Noriega to coordinate the arrival and parking of a U-Haul truck at the home invasion-drug ripoff site to heist the drugs.

## **II. ANALYSIS**

The joinder of defendants is proper:

... if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses....

Fed.R.Crim.P. 8(b). *See also* *United States v. Fernandez*, 388 F.3d 1199, 1242-43 (9<sup>th</sup> Cir. 2004)(joinder of defendants charged with various drug trafficking crimes proper because all were involved in criminal activity related to Mexican mafia), *modified*, 435 F.3d 1248 (9<sup>th</sup> Cir. 2005). Categorically, the “same series of acts or transactions” includes conspiracies. *Id.* at 1242 (joinder proper because all defendants faced conspiracy charges despite that only a sub-group of defendants were charged with predicate RICO offenses).

Even though joinder may be proper, a court may order severance of defendants:

[i]f the joinder of ... defendants in an indictment, ... appears to prejudice a defendant ..., the court may ..., sever the defendants’ trials, ....

Fed.R.Crim.P. 14(a). Defendant Jesus Noriega, as the moving party:

must show more than that a separate trial would have given him a better chance for acquittal. He must also show violation of one of his substantive rights by reason of the joint trial: unavailability of full cross-examination, lack of opportunity to present an individual defense, denial of Sixth Amendment confrontation rights, lack of separate counsel among defendants with conflicting interests, or failure properly to instruct the jury on the admissibility of evidence as to each defendant. In other words, the prejudice must have been of such magnitude that the defendant was denied a fair trial.

*United States v. Douglass*, 780 F.2d 1472, 1478 (9<sup>th</sup> Cir. 1986)(*quoting United States v. Escalante*, 637 F.2d 1197, 1201 (9<sup>th</sup> Cir. 1980)).

Defendant Jesus Noriega acknowledges that joinder of the Defendants was proper under Rule 8 of the Federal Rules of Criminal Procedure. (Defendant Jesus Noriega’s Motion To Sever Case From Carlos Chavez (Doc. 210), p. 4). The basis for Defendant Jesus Noriega’s motion is that the evidence against Co-Defendant Carlos Chavez is so

1 overwhelming and wholly disparate and disproportionate to that evidence against Defendant  
2 Jesus Noriega, that the jury will be unable to compartmentalize the evidence ascribable to  
3 each and hinder Defendant Jesus Noriega's ability to possibly pursue an entrapment defense  
4 to the charges.

5 It is possible that evidence against one defendant may enkindle transference of guilt  
6 from one defendant to another. *See Kotteakos v. United States*, 328 U.S. 750, 774  
7 (1946)("The dangers for transference of guilt from one to another across the line separating  
8 conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice  
9 to substantial right has not taken place."). However, this "spillover" is not tantamount to  
10 substantial prejudice. *United States v. Sullivan*, 522 F.3d 967, 981-82 (9<sup>th</sup> Cir. 2008)(denial  
11 of severance proper, in part, because jury demonstrated compartmentalization through  
12 "selective verdicts"); *United States v. Hanley*, 190 F.3d 1017, 1027 (9<sup>th</sup> Cir. 1999)(denial of  
13 severance proper when defendant charged with fewer offenses and defendant's "name arose  
14 somewhat less often during the trial...."), *superseded by statute on other grounds relating to*  
15 *sentencing guidelines*.

16 The trial court has broad discretion to grant or deny a motion for severance under Rule  
17 14(a) of the Federal Rules of Criminal Procedure. *Zafiro v. United States*, 506 U.S. 534, 541  
18 (1993)("Rule 14 leaves the determination of risk of prejudice and any remedy that may be  
19 necessary to the sound discretion of the district courts."); *United States v. Jawara*, 474 F.3d  
20 565 (9<sup>th</sup> Cir. 2007). The exercise of this discretion balances judicial economy against any  
21 potential risk of prejudice to a defendant. *United States v. Pitner*, 307 F.3d 1178, 1181-82  
22 (9<sup>th</sup> Cir. 2002)(denial of severance proper because interest in hearing co-defendant's  
23 proffered testimony outweighed by interest in judicial economy); *United States v. Doss*, 630  
24 F.3d 1181 (9<sup>th</sup> Cir. 2011).

25 Statements made during the course of the conspiracy are admissible against Defendant  
26 Jesus Noriega whether he is tried jointly with or severed from Co-Defendant Chavez.

27 In order for a statement to qualify for admission as the statement  
28 of a co-conspirator, the following preliminary facts must be  
shown: (1) there was a conspiracy, (2) the defendant and the

1 declarant were participants in the conspiracy, and (3) the  
 2 statement was made by the declarant during and in furtherance  
 of the conspiracy.

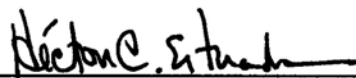
3 *United States v. Bridgeforth*, 441 F.3d 864, 869 (9<sup>th</sup> Cir. 2006); *see also* Fed.R.Evid.  
 4 801(d)(2)(E). The preliminary facts need only be proven by a preponderance of the  
 5 evidence. *United States v. Layton*, 855 F.2d 1388, 1401 (9<sup>th</sup> Cir 1988)(*citing Bourjaily v.*  
 6 *United States*, 483 U.S. 171, 175-76(1987)), *overruled on other grounds by United States v.*  
 7 *George*, 960 F.2d 97 (9<sup>th</sup> Cir. 1992)). Judicial economy in presenting conspiratorial evidence  
 8 but once, warrants that Defendant Jesus Noriega's trial not be severed from that of Co-  
 9 Defendant Chavez. Any potential prejudice to Defendant Jesus Noriega can be obviated by  
 10 the District Court's limiting instructions to the jury that evidence against each Defendant be  
 11 considered separately. *United States v. Decoud*, 456 F.3d 996, 1009 (9<sup>th</sup> Cir. 2006).

### 12 **III. RECOMMENDATION**

13 For the foregoing reasons, the Magistrate Judge recommends that the District Court  
 14 deny Defendant Jesus Noriega's Motion to Sever Case From Carlos Chavez (Doc. 210).  
 15 Pursuant to 28 U.S.C. §636(b), Rule 59 of the Federal Rules of Criminal Procedure, LRCrim  
 16 12.1 and LRCiv 7.2(e)(3), any party may serve and file written objections within fourteen  
 17 (14) days after being served with a copy of this Report and Recommendation. If objections  
 18 are filed, the parties should use the following case number: **CR 11-2326-TUC-RCC.**

19 Failure to file objections in accordance with Fed.R.Crim.P. 59 will result in waiver  
 20 of the right to review.

21 DATED this 25<sup>th</sup> day of September, 2012.

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Héctor C. Estrada  
 United States Magistrate Judge